Supreme Court, U.S.
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No. 89-1303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RESERVE LIFE INSURANCE COMPANY,
Petitioner,

v.

PATRICIA STEPHENSON EICHENSEER,
Respondent.

REPLY MEMORANDUM

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REPLY MEMORANDUM

This reply memorandum is submitted in light of this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Mar. 4, 1991).

As petitioner shall demonstrate below, the case at bar directly draws into question the applicability of the constitutional rule laid down in *Pacific Mutual* to cases in which punitive damages have been imposed for negligent, unintentional and non-malicious conduct. Mississippi's punitive damage system would appear to be *per se* unconstitutional because of the total failure of its courts, *see id.*, slip op., at 17 n.10, to exercise any significant appellate control over the size of punitive damage awards—a failure replicated by the Fifth Circuit panel in this case. This Court should, however, grant this petition to consider: (1) how the *Pacific Mutual* rule should apply to an increasing number of cases in which state courts, departing radically from centuries of Anglo-American jurisprudence, have sustained the imposition of punitive damages for purely negligent conduct; (2) how a federal court of appeals exercising jurisdiction in a diversity case must apply *Pacific Mutual* to a punitive damage award where the diversity State's courts have not adopted constitutionally sufficient procedures to ensure that punitive damage awards are imposed fairly and are not constitutionally excessive; and (3) whether in any event punishment in the form of punitive damages may be imposed retrospectively for violation of legal rules that did not exist at the time the conduct at issue occurred.

1. History is a two-edged sword. When the Fifth Amendment became part of our Constitution in 1791, it was well understood that punitive damages were available only where the conduct to be punished was "of the most atro-

cious and dishonorable nature," *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 91 (1791). Prior to the ratification of the Fourteenth Amendment in 1868, this Court affirmed its understanding that negligence was an insufficient predicate for the imposition of exemplary or punitive damages in civil actions brought by private persons. *See Philadelphia W. & B. R. Co. v. Quigley*, 62 U.S. (21 How.) 202 (1859). And less than a decade after ratification, this Court announced as a federal rule that "gross or ordinary negligence [does] not authorize [a] jury to visit [a defendant] with [punitive damages]." *Milwaukee & St. Paul Ry.* v. *Arms*, 91 U.S. 489, 495 (1876). The commentators of that era agreed. *See* T. Sedgwick, *Measure of Damages* 545 & n.+ (4th ed. 1868) (even fraud insufficient to support punitive damages unless "accompanied by gross malice and manifest design to injure"). Cf. *Pacific Mutual*, slip op., at 4 (Scalia, J., concurring in the judgment) (impracticable to set bounds on jury discretion where conduct of defendant reflects "malicious intent") (quoting T. Sedgwick, *supra*, 537-38 n.1).

In her opposition in this case, respondent candidly acknowledges that this case "does not involve elements of fraud or the various intentional torts . . . for which punitive damages have traditionally been awarded." Opp., at 3. Thus, under this Court's decision in *Pacific Mutual* a substantial question arises whether the procedures adopted by Alabama and other States to control punitive damages are constitutionally sufficient given the overwhelming historical rejection of the imposition of punitive damages on a negligence standard during the 19th Century and, until recently, the 20th Century.[1]

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[1] The imposition of punishment—in civil or criminal proceedings—in the absence of intent or *mens rea* is also generally inconsistent with fundamental and accepted notions of fairness. *See Dennis* v. *United States*, 341 U.S. 494, 500 (1951) (Vinson, C.J.) (plurality opinion) ("The existence of a *mens rea* is the rule of, rather than an exception to, the principles of Anglo-American criminal jurisprudence.") Indeed, as

In addition to Mississippi as a general matter and the Fifth Circuit in this case specifically, at least one State, Alabama, has authorized and expressly upheld an award of punitive damages for simple negligent conduct. *Alabama Power Co.* v. *Turner*, No. 89-408 (Ala. Jan. 11, 1991). Six other States appear to have subscribed to the notion that "gross negligence" is sufficient to sustain a punitive damage award.[2] The Court should act in this case to establish what

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then Judge Blackmun observed in 1960, under this Court's cases the elimination of intent as an element of a criminal offense would offend the due process clause unless, *inter alia*, "the penalty is relatively small . . . ." *Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960). *See generally United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("While strict liability offenses . . . do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses, attest to their generally disfavored status.") In *Gypsum*, this Court held intent was an element of the criminal antitrust laws because, *inter alia*, the Sherman Act "does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *Id.*, at 438. As Reserve demonstrates in the Petition, the conduct for which it has been punished was not just ill-defined, it was not defined as punishable conduct at all. More than thirty years after *Holdridge* was decided, Justice Blackmun, writing for this Court, announced that for constitutional purposes punishment administered in a civil proceeding implicates the same constitutional concerns as are implicated by punishment administered after a criminal trial. *United States* v. *Halper*, 109 S. Ct. 1892, 1903 (1989). Thus, it follows that if punitive damages can be imposed at all for negligent conduct, the procedures that must accompany their imposition are necessarily more exacting and the due process limits on their size much greater than in cases in which an evil or malicious intent must be shown.

[2] *See, e.g., Kelsay* v. *Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 359 (1978); *Newton* v. *Hornblower, Inc.*, 224 Kan. 506, 582 P.2d 1136, 1150 (1978); *Oliver* v. *Martin*, 460 A.2d 594, 595 (Me. 1983); *Mississippi Power Co.* v. *Jones*, 369 So.2d 1381 (Miss. 1979); *Paris* v. *Michael Kreitz, Jr., P.A.*, 75 N.C. App. 365, 331 S.E.2d 234, *review denied*, 315 N.C. 185 (1985); *Mullins* v. *Ward*, 712 P.2d 55, 63 n.22 (Okla. 1985); *Inland Container Corp.* v. *March*, 529 S.W.2d 43, 45 (Tenn. 1975); *Tex. Civ. Prac. & Rem. Code Ann.* § 41.003 (Vernon 1987 &

procedural constraints are imposed by the Due Process Clause in addition to those articulated in *Pacific Mutual* where state law imposes punitive damages for negligent conduct.

2. As the Court acknowledges in *Pacific Mutual*, the elaborate procedures for strict appellate review in Alabama relied upon to reject a facial challenge to the Alabama punitive damage system have not been adopted or applied by the Mississippi courts, a fact which "distinguishes Alabama's system from the . . . Mississippi scheme[ ] . . . ." Slip op., at 17 n.10. As Judge Jones pointed out below in this case, "Mississippi courts all but refuse to interfere with the amounts of punitive damages assessed by the fact finder." Cert. Pet. App. F, at 78a (Jones, J., dissenting from denial of rehearing *en banc*).

It would thus appear that should this Court grant this petition, vacate the judgment and remand this case to the Fifth Circuit, that court will have little choice but to declare Mississippi's punitive damage system unconstitutional *per se*. This prospect, however, raises an additional question, not addressed in *Pacific Mutual*, as to how federal courts sitting in diversity in punitive damage cases are to implement the rule laid down in *Pacific Mutual*. Should

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Supp. 1991).

This Court has, in the recent past, indulged the assumption that the several States had not set their juries loose to impose punitive damages on a finding of negligence. In *Smith* v. *Wade*, 461 U.S. 30, 43 (1983), the Court noted that the standard of "gross negligence" had also been rejected because "too vague, and too likely to be confused with mere ordinary negligence." *See also International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 61 (1979) ("No court . . . has ever held negligence can form the basis for a proper punitive damage award") (Blackmun, J., concurring); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages available only for "intentional or malicious" misconduct) (Blackmun, J., for the Court). The Court must now deal with the reality facing Reserve and all other punitive damage defendants whose negligent conduct has been or may be punished by punitive damages because some States have jettisoned the centuries-old rule to the contrary.

the federal courts of appeals strike down facially inadequate state schemes such as Mississippi's, or should they instead fashion their own constitutionally adequate procedures? (Such procedures could ostensibly be fashioned under authority that might appropriately be characterized as a power to fashion rules of federal constitutional common law derived from the *Pacific Mutual* rule.) This case is an appropriate vehicle for the Court to address and resolve this question before the lower federal courts descend into chaos on the issue.

3. *Pacific Mutual* does not, of course, address Question 2 presented by Reserve involving the constitutionality under the Due Process and Contracts Clauses of the retrospective imposition of punitive damages under a substantive standard of conduct that did not exist at the time the conduct at issue occurred. Because it is impossible to form an intent to violate a non-existent legal duty, Question 2 fairly subsumes both the procedural question discussed in part 1 above and the underlying question whether any array of procedures would serve to permit the retrospective imposition of punitive damages. As Reserve demonstrates in the Petition, at 23-30, this is an important and frequently recurring question upon which the Court's guidance is urgently needed.

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Respectfully submitted,

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